FOR ARGUMENT

No. 84-1023

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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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We demonstrated in our opening brief that the language, legislative history, and purposes of the Speedy Trial Act all compel the conclusion that a new 30-day defense preparation period does not begin to run when a superseding indictment is returned. Respondent has pointed to nothing that supports a contrary reading of the Act.

1. The Speedy Trial Act in terms provides that the 30-day preparation period runs "from the date on which the defendant *first* appears through counsel or expressly waives counsel." 18 U.S.C. 3161(c)(2) (emphasis added). Respondent simply disregards this language, and reads the statute as though the "date" described is "the date defendant *first appears through counsel on the indictment upon which the defendant ultimately goes to trial.*" Resp. Br. 21, 22 (emphasis in original). But nothing in Section 3161(c)(2) supports such a construction; to the contrary, "when

employing the term 'first,' Congress presumably did not have *subsequent* appearances in mind." *United States* v. *Darby,* 744 F.2d 1508, 1520 (11th Cir. 1984), cert. denied, Nos. 84-1261 and 84-1260 (May 13, 1985) (emphasis in original).[1] In essence, respondent's brief is a lengthy request that the Court rewrite the Act.[2]

2. Given the clarity of Section 3161(c)(2), respondent can prevail only if the legislative history contains "the most extraordinary showing of contrary intentions." *United States* v. *Albertini,* No. 83-1624 (June 24, 1985), slip op. 4. Yet respondent has failed to offer a single item of legislative history that supports his view of the relationship between superseding indictments and Section 3161(c)(2).

Instead, respondent's discussion of the legislative history is in large part negative: he argues (Br. 16-18) that the Second Circuit guidelines, from which Section 3161(c)(2) was derived, are not apposite to the question here. As we explained in our opening brief (at 24-26 & n.18), however,

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[1]Respondent also makes no attempt to respond to our argument (U.S. Br. 14-15) that Section 3161(d)(1) sheds light on Congress's intentions regarding Section 3161(c)(2). Section 3161(d)(1) provides that the defendant is afforded a new preparation period when the indictment is dismissed on the defendant's motion and a new indictment subsequently is returned. Congress's contrasting omission of a new 30-day period in cases involving superseding indictments suggests that new automatic preparation periods are not required by the Act in such cases.

[2]Respondent suggests that his construction is required by the rule of lenity (Br. 21). But the rule of lenity provides only that ambiguous statutes should be read narrowly to "ensure[] that criminal statutes will provide fair warning concerning conduct rendered illegal" (*Liparota* v. *United States,* No. 84-5108 (May 13, 1985), slip op. 8); it does not require the courts to apply every procedural rule in a manner that benefits the defendant. In any event, the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Albernaz* v. *United States,* 450 U.S. 333, 342 (1981). There is no ambiguity in Section 3161(c)(2).

the guidelines explicitly provided that district courts were free "to adhere to the originally scheduled trial date" after the return of a superseding indictment if "neither party needs any additional time to prepare for trial on the superseding indictment." Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act (Jan. 16, 1979), reprinted in the Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 420 (1979) ["*1979 Senate Hearings*"]. See *id.* at 418-419.

It is true, of course, that the Second Circuit guidelines did not make a 30-day preparation period mandatory even after the first indictment. But such a period was presumptively to be made available at that time upon a request by the defense or prosecution (*1979 Senate Hearings* 392-393); in contrast, a new 30-day period was not to be granted as a matter of course after the return of a superseding indictment. Because Congress urged the courts to consult the guidelines when construing the Act (as we explain in our opening brief at 29-30), the structure of the guidelines is persuasive evidence that Section 3161(c)(2) was not intended to provide for an automatic 30-day delay after the return of a new indictment.

3. Respondent is untroubled by the anomaly that follows from his construction of the Act, namely, that the application of Section 3161(c)(2) to superseding indictments, in combination with the 70-day indictment-to-trial limit imposed by Section 3161(c)(1), may lead to cases in which no trial date will be permissible (see U.S. Br. 17-18). Respondent purports to solve this problem by offering several (mutually inconsistent) routes for the government to use in bringing defendants to trial following a superseding indictment. Unfortunately, none finds support in the statute. This state of affairs strongly suggests that respondent's

underlying premise—his claim that he is entitled to a new 30-day preparation period—is incorrect.

a. Respondent's principal proposal (Br. 30-31) is that, when a superseding indictment is returned before the original indictment is dismissed, both the 30-day and the 70-day periods begin running anew.[3] Under this view, the government could avoid the strictures of the Act and secure additional delay in any case by the simple expedient of filing a superseding indictment making minor changes in the description of the offense. Such a result would not be tolerable, and in fact the structure of the statute makes it plain that respondent's suggestion is untenable. When an indictment is dismissed on the government's motion and new charges subsequently are filed against the defendant for the same or a related offense, a new 70-day period is *not* provided; instead, Section 3161(h)(6) provides only that the

[3]Respondent's reading draws some support from *United States* v. *Feldman*, 761 F.2d 380 (7th Cir. 1985), which held that the defendant is entitled to a new preparation period after the return of a superseding indictment. See *id.* at 388-389. But the court of appeals there based its holding on an irrational distinction. It acknowledged that a new preparation period may not be granted when the government moves for and obtains dismissal of the first indictment after obtaining the superseding indictment. *Ibid.* (citing *United States* v. *Horton*, 676 F.2d 1165, 1170 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983)). The court offered no reason for its conclusion that a different result is in order when the government fails to seek dismissal of the first indictment after obtaining a superseding indictment. In any event, *Feldman*—unlike this case—involved a superseding indictment that added new counts and new substantive offenses (761 F.2d at 389), factors that made the need for additional preparation time more apparent than it is here. While the Court need not decide the question in this case, we submit that additional preparation time should not be made available automatically under Section 3161(c)(2) even when the superseding indictment adds new charges. See *United States* v. *Gallo*, 763 F.2d 1504, 1522-1524 (6th Cir. 1985); *United States* v. *Guzman*, 754 F.2d 482, 485-486 (2d Cir. 1985), petition for cert. pending, No. 84-1604; U.S. Br. 24-25. When additional time is necessary, it may be provided under 18 U.S.C. 3161(h)(8)(B)(iv). See note 4, *infra*.

period between indictments is excluded in calculating the trial deadline. If Congress did not want the government to get a full 70 days after dismissal and reindictment, it is difficult to imagine that it would have wished Section 3161(c)(2) to be construed to provide for a new 70-day period after the return of a superseding indictment. Indeed, whenever Congress wanted to give the government a new 70-day period, it did so explicitly. See, *e.g.*, 18 U.S.C. 3161(d)(1) and (2), (e), (i).

b. Respondent also suggests (Br. 39) that the 30-day preparation period should simply be excluded from the 70-day calculus, so that the "speedy trial clock" would stop running for 30 days after the defendant is arraigned on a superseding indictment. Again, however, respondent's proposal is inconsistent with the structure of the Act. The exclusions from the 70-day calculus—including periods covered by continuances that are granted to give defense counsel "the reasonable time necessary for effective preparation" (18 U.S.C. 3161(h)(8)(A) and (B)(iv))—are listed in Section 3161(h). Nothing there provides for the automatic exclusion of Section 3161(c)(2)'s thirty-day preparation period. See *United States* v. *Richmond*, 735 F.2d 208, 214 (6th Cir. 1984). Indeed, the courts uniformly have calculated the expiration of the 70-day period within which trial must be held without excluding the 30-day preparation period.

c. Evidently recognizing that his submission cannot be reconciled with the Act's structure, respondent ultimately maintains (Br. 37-38) that a new 30-day period should be made available automatically even if that means that no trial date will be permissible under the Act. He suggests that the government will have brought this consequence on itself by choosing to return a superseding indictment more than 40 days after the initial indictment, and that in such circumstances it is the government's responsibility to obtain an "ends of justice" continuance under Section 3161(h)(8).

This proposal, too, is without merit. The timing of the superseding indictment is likely to follow from the grand jury's schedule or workload; in other instances, the loss of witnesses or evidence—which may occur at any time—may necessitate the dropping of counts. It is absurd to suggest that Congress wrote the Act to provide that such developments automatically would make trial impossible without judicial intervention. Instead, the Act is far more sensibly read to provide that the burden of obtaining a continuance is appropriately shouldered by the party that is seeking additional preparation time.

4. Finding nothing helpful in the language and legislative history of the Act, respondent argues (Br. 22-25) that, as a practical matter, a defendant will need an additional 30 days to prepare after the return of *any* superseding indictment. We do not deny, of course, that additional preparation time occasionally will be necessary after the return of a new indictment, and in those cases a continuance will be available under 18 U.S.C. 3161(h)(8)(B)(iv). But one need look only at the circumstances of this case and respondent's utterly unconvincing attempt to explain his need for an additional 30 days to prepare in order to see that many superseding indictments will have absolutely no effect on defense preparation. Some, as in this case, will involve the correction of nonsubstantive "clerical error[s]" (*United States* v. *Adu,* No. 84-1106 (9th Cir. Sept. 16, 1985), slip op. 5); in other cases, as was also true here, the defendant will be informed of the substance of the change long before the prosecutor has an opportunity to re-present the case to a grand jury; and in some instances the superseding indictment will simply reduce the number of charges. Such circumstances plainly do not warrant the automatic grant of an additional 30 days to prepare for trial. This is, after all,

the "Speedy Trial Act" that is being construed, not the "Delayed Trial Act." [4]

5. Respondent's argument against the application of the harmless error rule to violations of Section 3161(c)(2) also is implausible. He suggests (Br. 44) that reversal should be automatic when such a violation is found because Congress set down an "inflexible rule" that the defense should have 30 days for trial preparation. But the harmless error rule routinely is applied to equally "inflexible" provisions. See, *e.g.*, *Rosenberg* v. *United States,* 360 U.S. 367, 370-371 (1959) (violation of the Jencks Act, 18 U.S.C. 3500, held harmless); *Rogers* v. *United States,* 422 U.S. 35, 40 (1975) (harmless error rule applicable to Fed. R. Crim. P. 43); *United States* v. *Donovan,* 429 U.S. 413, 432-440 (1977) (suppression of evidence need not follow from technical violations of the wiretap provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518). There is no reason to treat violations of Section 3161(c)(2) differently. The grant of a new preparation period in a case such as this one hardly can be termed

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[4]Both the Eleventh Circuit and the Ninth Circuit itself recently have rejected the conclusion of the court below, holding that additional preparation time must be provided after the return of a superseding indictment only when necessary to "assur[e] the defendant in a criminal case adequate time for preparation." *United States* v. *Hawkins,* No. 83-3704 (11th Cir. July 22, 1985), slip op. 5324. See *Adu,* slip op. 5. We note, however, that these courts—like several others (see U.S. Br. 33-34)—erroneously suggested that Section 3161(c)(2) might itself be the source for the new preparation period when additional time is necessary. See *Hawkins,* slip op. 5324; *Adu,* slip op. 6. As we explain in our opening brief (at 33-37), additional time, when necessary, is appropriately granted by means of a continuance issued under Section 3161(h)(8). Use of the continuance mechanism in such circumstances is consistent with the structure of the Act and gives the courts the flexibility to dole out as much time as is needed, but no more.

crucial to the integrity of the trial process. Compare, *e.g., Jackson* v. *Virginia,* 443 U.S. 307, 320 n.14 (1979). In short, respondent has confused error with prejudicial error (see U.S. Br. 40-41).

Respondent also appears to suggest (Br. 47) that the harm that would flow from a violation of Section 3161(c)(2) cannot easily be measured or evaluated. That is true in a case like the present one only in the sense that the potential harm is so microscopic as to be invisible—a problem of measurement that does not impede application of harmless error principles. In fact, as we noted in our opening brief (at 43-44), the Court has made it clear that the degree of prejudice flowing from an abridged preparation period is calculable by the courts and that reversal of a conviction requires a finding of prejudice. See *United States* v. *Cronic,* No. 82-660 (May 14, 1984); *Chambers* v. *Maroney,* 399 U.S. 42, 54 (1970); *Avery* v. *Alabama,* 308 U.S. 444 (1940). It may well be, as respondent suggests (Br. 44, 47), that the courts will not find prejudice when the violation of the Act is trivial. But absent a clear statement to the contrary in the Act or its legislative history, there is no reason to believe that Congress would have wanted reversals to follow from inconsequential errors.[5]

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[5]Respondent appears to argue (Br. 23-24) that the return of the superseding indictment here prejudiced his defense. While he complains about failure to obtain his "A" file (see U.S. Br. 5), however, he does not suggest that anything about the second indictment affected his need for the file; in fact, respondent alleged in district court that the file was relevant only to his defense on the second count of the indictment, which was dismissed (see *id.* at 5-6). Respondent also suggests (Br. 23) that the superseding indictment deprived him of a defense by making it impossible for him to argue that he had not been convicted on December 17, 1981. But the superseding indictment simply made it impossible for respondent to raise a spurious defense by relying on a typographical error in the original indictment. In any event, this development should not have taken respondent by surprise; the actual date of the conviction was disclosed to respondent's counsel long before the superseding indictment was returned (see U.S. Br. 45).

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

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